UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EVELYN P. MELNICK, Appellant, v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	DOCKET NUMBER DE04328810211 DATE: OCT -2 1989

Nan Neufeld, National Federation of Government Employees, Denver, Colorado, for the appellant.

Marc Rothberg, Esquire, Denver, Colorado, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The agency has petitioned for review of the July 26, 1988, initial decision that reversed its removal action. For the reasons set forth below, the Board GRANTS the agency's petition, REVERSES the initial decision, and SUSTAINS the agency's removal action.

BACKGROUND

The agency removed the appellant from her position as a GS-5 Secretary for failure to acceptably perform one critical element of her performance plan, Critical Element No. 6, "Special Tasks." The appellant's performance was found to be unacceptable in both components of that critical element -- the performance of non-routine special tasks and the timely completion of office time and attendance reports.[1] After considering the appellant's oral and written replies to the notice of proposed removal, the agency's deciding official found that the evidence supported an unacceptable performance rating based on the appellant's failure to meet the critical element in question. Specifically, the deciding official determined that the appellant's performance of Critical Element No. 6 had not

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[1] Fully successful performance in Critical Element No. 6 requires the following:

> Non-routine special tasks are carried out accurately, professionally and timely. Results are well thought out, displayed and presented, with minimum input from the immediate supervisor.
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> Time and Attendance Reports are completed in accordance with the Timekeeper's Handbook and submitted on time. These reports are always legible and an accuracy rate of at least 90 percent is maintained. Time and Attendance Reports are filed and properly updated within two weeks of receipt.

See Appeal File, Tab 9, Subtab 4n.

improved since her unsuccessful completion of a 30-day performance improvement period (PIP) in which her supervisor had "clearly outlined what [the appellant] needed to do to bring [her] performance to an acceptable level." *See* Appeal File (A.F.), Tab 9, Subtab 4b. The deciding official found no merit to the appellant's allegations of procedural irregularities and racial antagonism, and concluded that the appellant's removal "would be in the best interest of the Federal service." *Id.*

The appellant filed a petition for appeal with the Board's Denver Regional Office expressing her disagreement with her performance evaluations, and contending that her removal was the result of handicap, sex, age, and religious discrimination.[2] The appellant also raised several allegations of harmful procedural error.

The administrative judge reversed the agency's action on appeal, finding that: (1) The performance standard under the non-routine tasks component of Critical Element No. 6 was invalid because it was either impermissibly vague or impermissibly absolute; and (2) although the agency proved that the appellant's performance under the timekeeping component of Critical Element No. 6 was unsatisfactory, the agency failed to show that the appellant's unacceptable performance of that single component warranted finding her performance to be unacceptable under the critical element as

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[2] The appellant later withdrew her allegations of sex, age, and religious discrimination at the Board's hearing. *See* Initial Decision at 8, n.5.

a whole. The administrative judge dismissed the appellant's claim of handicap discrimination, finding that the appellant had not established that she was a "qualified handicapped individual" under 29 C.F.R. § 1613.702(a). In light of his decision not to sustain the charge of unacceptable performance, the administrative judge found it unnecessary to address the appellant's allegations of harmful procedural error.

ANALYSIS

The administrative judge correctly found that the appellant had challenged the validity of her performance standards.

In its petition for review, the agency contends that it was improper for the administrative judge to rule on the non-routine tasks component of Critical Element No. 6 because the appellant never challenged the validity of that performance standard. In the initial decision, the administrative judge noted that the appellant had not expressly used the term "validity" in her pleadings before the Board. *See* Initial Decision (I.D.) at 3, n.2. The administrative judge nevertheless determined that the appellant had "challenged the validity of the [non-routine] special tasks component [of Critical Element No. 6] to the extent necessary to afford the agency a fair opportunity to address the issue throughout the adjudication." *Id.* We agree.

An administrative judge is expected to interpret pleadings liberally. *See Matter of Frazier*, 1 M.S.P.R. 163,

192 (1979). Further, the parties, particularly those without the benefit of legal counsel, are not required to plead the issues with the precision required of an attorney in a judicial proceeding. *See Roche v. United States Postal Service*, 828 F.2d 1555, 1558 (Fed. Cir. 1987). *Cf. Hubbard v. Walter Reed Army Medical Center*, 29 M.S.P.R. 187, 189 (1985) (an issue may be considered raised if a party introduces evidence into the record without objection); *Kennedy v. Department of the Army*, 22 M.S.P.R. 190, 193 (1984) (the administrative judge must attempt to clarify the issue where the appellant sets forth facts which tend to constitute the essence of an affirmative defense).

We find that a challenge to the validity of the performance standards forming Critical Element No. 6 was implicitly raised in the appellant's complaint that it was "impossible and unreasonable" for her to complete assigned tasks under that critical element within the time limits prescribed by the agency. *See* A.F., Tab 10. Thus, we concur with the administrative judge's determination that the appellant had challenged the validity of her performance standards, and find that the administrative judge responded appropriately by requiring the agency to then establish the validity of its standards by proving that they did not constitute an abuse of discretion. *See Benton v. Veterans Administration*, 37 M.S.P.R. 284, 286 (1988); *Callaway v. Department of the Army*, 23 M.S.P.R. 592, 597 (1984) (the Board will apply an abuse-of-discretion standard to

determine whether the agency has violated 5 U.S.C. § 4302(b)(1) in establishing an absolute performance standard as part of its performance appraisal system).

The non-routine special tasks component of Critical Element No. 6 constitutes a valid performance standard.

When the Board reviews an agency performance standard, it must determine whether, under the circumstances of the case, the standard accords with the requirements of 5 U.S.C. § 4302(b)(1) and the guidelines set forth by the Office of Personnel Management. *See Benton*, 37 M.S.P.R. at 286. The agency is required to establish standards which, to the maximum extent feasible, permit the accurate appraisal of performance based on objective criteria, and which are reasonable, realistic, attainable, and clearly stated in writing. *Id.*, citing *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620 (1984). The agency may satisfy its obligation to the employee under 5 U.S.C. § 4302(b) by communicating to the employee the standards she must meet in order to be evaluated as demonstrating performance at a level which is sufficient for retention in her position. *See Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 298 (1985). Those standards may be more or less objective depending upon the job measured, but must be sufficiently specific to provide a firm benchmark toward which the employee must aim her performance. *Id.* Such communication may occur through written instructions, information concerning deficiencies and methods of improving

performance, memoranda describing unacceptable performance (e.g., in the PIP itself), responses to the employee's questions concerning performance, or in any manner calculated to apprise the employee of the requirements against which she is to be measured. *Id.* *See also Baker v. Defense Logistics Agency,* 25 M.S.P.R. 614, 617 (1985), *aff'd,* 782 F.2d 1579, 1583 (Fed. Cir. 1986). Moreover, the fact that the performance standard may call for a certain amount of subjective judgment on the part of the employee's supervisor does not automatically invalidate it. *See Wilson v. Department of Health and Human Services,* 770 F.2d 1048, 1055 (Fed. Cir. 1985).

In order for the appellant here to demonstrate successful performance under the non-routine special tasks component of Critical Element No. 6, she was required to perform non-routine tasks "accurately, professionally and timely," and to obtain results that were "well thought out, displayed and presented." *See* A.F., Tab 9, Subtab 4n. "Non-routine special tasks" are, by definition, ad hoc assignments that vary widely in nature and that occur on an intermittent basis, along with the appellant's regularly-scheduled and anticipated job duties. Extreme specificity in the written performance standard relating to such special, non-routine assignments therefore cannot be expected, and is unnecessary so long as the agency provides the appellant with additional, specific information about

her job requirements adequate to apprise the appellant of what is expected of her. *See Donaldson*, 27 M.S.P.R. at 298.

Here, the agency communicated what was required of the appellant both prior to and during the PIP. *See* A.F., Tab 9, Subtabs 4m-o. Indeed, as the administrative judge noted, "the agency clearly reminded the appellant of four specific special tasks which remained incomplete at the outset of the performance improvement period . . . ." *See* I.D. at 4. Accordingly, because the agency provided the appellant with a detailed description of the standards against which she was being measured, and because it was not unreasonable for the agency to expect completion of the assigned tasks by the end of the PIP,[3] we find that the performance standard relating to special tasks met the statutory requirements for validity under 5 U.S.C. § 4302. *See Wilson*, 770 F.2d at 1055-56.

The agency proved by substantial evidence that the appellant performed unacceptably under the non-routine special tasks components of Critical Element No. 6.

The administrative judge sustained the charge of unsatisfactory performance in the "timekeeping" component of Critical Element No. 6, finding that the agency had presented substantial evidence showing that the appellant's

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[3] The "special tasks" slated for completion by the appellant during the PIP consisted of setting-up office files, organizing her work area, hole-punching program files, and providing her supervisor with a daily list of work accomplishments. *See* A.F., Tab 9, Subtab 4m. We find that the thirty days provided to the appellant for the completion of these tasks was more than adequate given their relatively simple nature.

performance was deficient under that component. See I.D. at 5. The administrative judge made no evidentiary findings with regard to the "non-routine special tasks" component, however, having already determined that performance standard to be invalid. We now make those findings in light of our reversal of that determination.

The agency detailed its dissatisfaction with the appellant's performance under the non-routine special tasks component of Critical Element No. 6 by listing a number of non-routine tasks (that had previously been assigned to the appellant during the course of her duties) that remained incomplete at the outset of the PIP. See A.F. Tab 9, Subtab 4m. Those tasks also remained unfinished at the conclusion of the PIP. Because the record reveals no viable justification for the appellant's continuing performance deficiencies under this component, see id. at Subtabs 4b-e, we conclude that the agency met its burden of proving by substantial evidence that the appellant's performance was unacceptable under the "non-routine special tasks" component of Critical Element No. 6.[4] 5 C.F.R. § 1201.56(a)(i).

The appellant has failed to establish her allegations of harmful procedural error.

The appellant raised several allegations of harmful procedural error in her initial appeal. These allegations

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[4] In light of this finding, the Board finds it unnecessary to address the agency's contention that the administrative judge erred in his analysis of the agency's burden of proof regarding the timekeeping component of Critical Element No. 6.

were not addressed by the administrative judge. The appellant contended that: (1) The removal action was fatally flawed because the supervisor who proposed the removal had not supervised the appellant for 120 days prior to the PIP; (2) the agency erred by failing to keep a verbatim transcript of the appellant's oral response to the proposed removal; (3) it was error for the proposing and deciding officials to engage in discussions regarding the removal action; and (4) it was error for the PIP to last only thirty days when the appellant had been given sixty days to demonstrate acceptable performance for purposes of receiving her scheduled within-grade salary step increase. Because these contentions are without merit, we find that the appellant has failed to establish any harmful error on the part of the agency. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983) (reversal of an action is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied sub nom. Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984).

The appellant asserts that the agency violated the Federal Personnel Manual (FPM) by allowing an individual who had supervised her for less than 120 days prior to the PIP to issue her a performance rating. We are unaware of any regulation that mandates a minimum period of service by a supervisor in a particular position before that supervisor

can properly issue a performance rating to a subordinate. The provision specifically cited by the appellant, FPM Chapter 430, Subchapter 1-5, indicates only that 120 days is the recommended minimum amount of time that an employee should serve in any one position before receiving a performance appraisal.

The Board is similarly unaware of any requirement for an agency to keep a verbatim transcript of an employee's oral response to a proposed adverse action. In any event, the deciding official here adequately responded to the appellant's documentation concerns by compiling a written "Summary of issues presented [by the appellant] in response to the Notice of Proposed Removal." *See* A.F., Tab 9, Subtab 4e.

Next, and contrary to the appellant's assertion, there is no statutory or regulatory prohibition against ex parte communications between the proposing and deciding officials and any other officials or persons during the agency's decision-making process. *See Andersen v. Department of State*, 27 M.S.P.R. 344, 348 (1985), *aff'd*, 790 F.2d 91 (Fed. Cir. 1986). Such communications are proper absent a showing by the appellant that they are prohibited by statute or regulation or that they were improperly motivated. *See id.*; *Sullivan v. Department of the Navy*, 720 F.2d 1266, 1274-76 (Fed. Cir. 1983) (court found that the improper influence of an agency official in the decision-making process, motivated by animus against the employee for filing a grievance

against the official, rendered the action a prohibited personnel practice under 5 U.S.C. § 2302(b)(8)).

Finally, we find that the 30-day PIP afforded to the appellant satisfied the agency's obligation under 5 U.S.C. Chapter 43 to provide the appellant with a reasonable opportunity to demonstrate acceptable performance prior to initiating an adverse action based on her performance. *See, e.g., Wood v. Department of the Navy*, 27 M.S.P.R. 659, 663 (1985). That the appellant may have been provided with a longer period of time in which to demonstrate acceptable performance for purposes of her scheduled within-grade increase does not, in itself, detract from the propriety of the 30-day PIP here at issue.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W, Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to

review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.